80-417

NO.

Supreme Court, U.S.
FILED
SEP 12 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM A. ANDERSON,
Petitioner,

v.

STATE OF GEORGIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF GEORGIA

THEODORE S. WOROZBYT
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September 12, 1980

QUESTION PRESENTED

Where the State presented its case in chief and no evidence whatsoever was introduced or proferred that the petitioner had given any statement pre-arrest, incident to arrest, or post-arrest; and where the petitioner testified in his own behalf and acknowledged the transaction in question and pleaded entrapment; and where the State, upon cross-examination of Anderson, after asking Anderson whether he still contended that he was entrapped, attempted to impeach Anderson's exculpatory testimony by asking the question:

"Let me ask you this, you denied these transactions when Lt. Sanders arrested you... didn't you?",

and where there was no waiver by Anderson or his counsel; and where the State neither introduced nor profferred any evidence in rebuttal that Anderson had made any statement; did the Georgia Court of Appeals err in ruling that Anderson was not denied his constitutional rights of due process under Jackson v. Denno, 378 U.S. 368, Mincey v. Arizona, 437 U.S. 385,

and Doyle v. Ohio, 426 U.S. 610.

TABLE OF CONTENTS

	Page
Question Presented	1
Table of Authorities	i
Reference to Opinions Below	3
Jurisdiction	4
Constitutional Provisions Involved	5
Statement of the Case	7
Reasons why the Writ Should be Granted	18
Argument	20
Appendix	29
Opinion Sought to be Reviewed	30
Order on Petition for Certiorari	33
Order on Motion for Reconsideration	34
Certificate of Service	35
Entry of Appearance of Counsel	36

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

Anderson v. Charles ____ U.S. ____, 65 L.Ed. 2d 222 — 18, 20, 21

Brookhart v. Janis 384 U.S. 1, 16 L.Ed 2d 314 — 21

Carnley v. Cochran 369 U.S. 506, 8 L.Ed. 2d 70 — 21

Doyle v. Ohio 426 U.S. 610, 49 L.Ed. 2d 91 — 2, 20, 21, 23, 24

Harris v. New York 401 U.S. 222, 28 L.Ed. 2d 91 — 25, 28

Jackson v. Denno 378 U.S. 368, 12 L.Ed. 2d 908 — 1, 21, 25, 27

Jenkins v. Anderson ____ U.S. ____, 65 L.Ed. 2d 86 — 18, 20, 21

Johnson v. Zerbst 304 U.S. 458, 82 L.Ed. 1089 — 21

Mincey v. Arizona 437 U.S. 385, 57 L.Ed. 2d 290 — 1, 18, 23, 25, 26

Miranda v. Arizona 384 U.S. 436 16 L.Ed. 2d 694 — 21

CIRCUIT COURT OF APPEALS

Breedlove v. Beto 404 F.2d 1019 (5th Cir., 1968) — 19, 27, 28

SUPREME COURT OF GEORGIA

Scott v. State 243 Ga. 233 — 18, 25

REFERENCE TO OPINIONS BELOW

Anderson's conviction was affirmed by the Georgia Court of Appeals on February 15, 1980. Anderson's Motion for Rehearing in the Georgia Court of Appeals was denied, with opinion rewritten, on March 12, 1980. See Anderson v. The State, 153 Ga. App. 841.

Anderson filed a Petition for the Writ of Certiorari in the Georgia Supreme Court on March 31, 1980.

The Georgia Supreme Court denied Anderson's Petition on June 19, 1980 (unreported). Anderson filed a Motion for Reconsideration on June 27, 1980.

The Georgia Supreme Court denied Anderson's Motion for Reconsideration on July 15, 1980.

JURISDICTION

Anderson seeks review of the decision of the Court of Appeals rendered on February 15, 1980, opinion rewritten March 12, 1980, affirming his conviction in Richmond County, Georgia. Said opinion is reported in 153 Georgia Appeals 841.

Anderson's Petition for Certiorari filed in the Georgia Supreme Court was denied on June 19, 1980 (unreported).

Anderson's Motion for Reconsideration was denied on July 15, 1980 (unreported).

Anderson invokes jurisdiction of this Court under Title 28, United States Code, §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The case involves the Fifth Amendment to the United States Constitution, to wit:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

The case also involves Section One of the Fourteenth Amendment to the United States Constitution, to wit:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Procedural Posture.

On January 19, 1979, in the Richmond County Superior Court, Augusta Judicial Circuit, Georgia, the January Term, Indictment No. 33 was returned against William A. Anderson and Forrest M. Squires charging the Defendants on two counts with violation of the Georgia Controlled Substances Act in that the Defendants did, on the 11th day of January, 1979, and the 16th day of January, 1979, unlawfully sell marijuana, a controlled substance, to Johnnie Smith.

On May 1, 1979, a jury trial commenced as to the Defendant Anderson and a verdict of guilty was returned on both counts on May 3, 1979.

On May 9, 1979, in the Superior Court of Richmond County, Anderson was sentenced to five years to serve on each count to run concurrently to be followed by five years' probation on each count, to run concurrently.

An appeal bond in the amount of $10,000 was set and made.

On or about May 25, 1979, Anderson filed a Motion for a New Trial, which Motion was overruled on August 31, 1979. On or about September 26, 1979, Anderson filed a Notice of Appeal to the Georgia Court of Appeals.

The Court of Appeals affirmed on February 15, 1980, Case No. 59107.

Anderson filed his Motion for Rehearing on February 25, 1980, which was denied on March 12, 1980, with the opinion rewritten. See 153 Georgia Appeals 841.

The Georgia Supreme Court denied certiorari on June 19, 1980, and Anderson's Motion for Reconsideration on July 15, 1980.

FACTS

Pursuant to jury trial commenced on May 1, 1979, the State introduced the testimony of seven witnesses. (Note: References to transcript of said trial.) The testimony of experts Thiesen, Sheppo, and Aschkenasy is irrelevant to the subject appeal in that Anderson acknowledged the transactions in question.

Officer Myers' testimony (T. 103-123) is

also irrelevant in that Myers merely observed and monitored the transactions acknowledged by Anderson.

The testimony of the Smith brothers, Charles and John, who dealt face to face with Anderson pursuant to the sales of the marijuana in question, makes out the case against Anderson. Charles Smith's testimony (T. 28-80) denies that Smith enticed or entrapped Anderson.

The sixth witness called by the State, Police Office Lieutenant Sanders is relevant in that Sanders testified that he arrested Anderson pursuant to the subject charges, but gave no testimony or proffered none that Anderson had given any statement whatsoever, either pre-arrest, incident to arrest, or post-arrest. (T. 123-203).

The State's case in chief clearly made out a case of marijuana sales against Anderson. It must be emphasized that nowhere in the State's case in chief did they ever show or attempt to show that Anderson had made any statement of any kind, pre-arrest,

incident to arrest, or post-arrest, nor did the State attempt to make such a showing in rebuttal (T. 268, 269).

Anderson testified on direct examination that he was 43 years old, born and raised in Augusta, Georgia, and was honorably discharged from the United States Navy in 1956.

Anderson became involved in law enforcement in the fall of 1962 as a Deputy Sheriff for Richmond County. Anderson became involved in politics in 1971 and was elected in that year to the office of Sheriff. Anderson ran again in 1972 and was elected to a four-year term. Anderson ran again in 1976 and was defeated.

After Anderson was defeated in 1976, he went into business for himself full time in January, 1977. Anderson recalled having a conversation with Charles Smith sometime in the summer of 1978 concerning Charles Smith being fired by Sheriff Beck.

Occasionally Anderson would meet casually with Charles Smith at various locations in the Augusta area. Anderson would see Charlie

Smith casually at Bonnie & Clyde's and other locations. (T. 222, 223).

In the latter part of November or early part of December, Charlie Smith, pursuant to casual conversations that Smith had with Anderson, wanted to know whether Anderson know anybody who could make marijuana available to Charlie Smith. Charlie Smith had brought up the subject of marijuana and had made inquiries of Anderson concerning "how profitable it would be." (T. 224, 225).

At first Anderson shunted Charles Smith off believing that Smith was talking about small quantities of marijuana for Smith's personal use. Smith became more persistent and broached the topic of marijuana half a dozen to a dozen times during November-December, 1978. Finally Anderson, in an effort to "get rid of Mr. Smith" indicated to Smith that Anderson would be on the lookout for something. (T. 225, 226).

During this period of time, Anderson had developed a relationship with the co-Defendant in the subject case, one Forrest Squires. On

occasion, Squires and Anderson would frequent Bonnie & Clyde's.

During the first week of January, 1979, Charles Smith, having offered to back Anderson politically on prior occasions invited Anderson to "political meetings" that Smith was planning on having at his restaurant. Specifically, the purpose of these meetings was to generate political support for Anderson to run again for Sheriff.

Specifically, Smith invited Anderson to a particular meeting on or about January 4, 1979, said meeting to take place at Smith's restaurant. Smith further told Anderson that such political meetings would be held on the first Thursday of each month. (T. 230, 231).

Smith would link his communications with Anderson pertaining to marijuana with Smith's apparent concern that Anderson should run for Sheriff in that Smith was desirous of politically supporting Anderson. In connection with Smith's political communications with Anderson, Smith would link requests of Anderson that Anderson make a contact for Smith to purchase

marijuana. (T. 239-243).

Anderson did not attend the January 4 political "meeting" notwithstanding Smith's invitation to same. Smith, of course, was awaiting Anderson with his "body mike" operable for said January 4, 1979, "meeting".

Finally, on or about January 10, 1979, Anderson agreed to put Smith together with the co-Defendant Herbert Squires for the purchase by Smith of some marijuana from Squires. In consideration for Anderson's help to Smith aforementioned, Smith was to help Anderson politically. (T. 243).

The balance of Anderson's direct testimony (T. 244-248), Anderson acknowledges the communications which were recorded in the transactions pursuant thereto. Anderson again maintained that he was induced by Smith to broker the marijuana sale between Smith and Squires. Anderson testifies that Smith repeatedly approached Anderson and interrelated Smith's offer of political support for Anderson with Smith's requests that Anderson make a "contact" for Smith.

During the cross-examination of Anderson by the District Attorney (T. 249-261), Anderson reiterated his acknowledgement of the transaction in question and that he had been enticed and entrapped into said participation by the conduct and communications of Charles Smith.

At T. 261, the following crucial questioning took place, whereby Anderson under cross-examination was asked:

> "Q: You still say that you are the one who was being persuaded by Charles Smith?
>
> A: Yes, sir.
>
> Q: Let me ask you this, you denied these transactions when Lt. Sanders arrested you there in Forrest Squires' apartment, didn't you?"

At this point, counsel for Anderson moved for a mistrial on the doctrine of Doyle v. Ohio, 426 US 610, 49 L.Ed. 2d 91 and Jackson v. Denno, 378 U.S. 368, 12 L.Ed. 2d 908; that there had been no showing by the State in its

case in chief that any statement had or had not been made.

In response to Anderson's Motion for a Mistrial, the District Attorney Stated as follows:

> "Your Honor, in this particular case the question was asked, the statement was not made. In addition, the State expects the evidence to show that he did not try to assert his Fifth Amendment rights in any way, but merely told the Investigator Sanders, 'I didn't do it; there is nothing to this, it's all political.' That is totally inconsistent and not in response to interrogation so that Miranda would play any part in it. It is inconsistent with the position he has now taken under oath before this jury, and whether Miranda was involved -- and it is not because it is not in response to interrogation of any sort --

even if Miranda were involved under Harris v. New York, we are allowed to bring in the inconsistency there and that is all we are attempting to do, to show that his position in court today and what he said from the stand is inconsistent with the statement he made immediately upon his arrest, not in response to interrogation." (T. 262, 263).

After comments by Anderson's counsel, the Court stated as follows:

"Well, I overruled the Motion for a mistrial. I am going to instruct counsel not to pursue that line of interrogation any further and I am going to instruct the jury to disregard the question." (Emphasis supplied, T. 264).

After the jury returned to the jury box, the Court instructed the jury as follows:

"Ladies and Gentlemen of

the Jury, I instruct you to disregard any question asked the witness about the statement that he purportedly made to Investigator Sanders and any answer which he started to give and I instruct counsel not to pursue that line of questioning any further." (Emphasis supplied, T. 265).

Anderson renewed his motion for a mistrial to preclude waiver under Georgia law. (T. 265). The State did not attempt to introduce or proffer any evidence of any alleged statement by Anderson in rebuttal although it is clear that the trial court did not preclude such attempt.

Anderson pursued only one point through the State appeal process, the Doyle-Jackson deprivation. This issue is now before this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. The Georgia Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court in light of this Court's recent decision in Anderson v. Charles, _____ U.S. _____, 65 L.Ed. 2d 222, 100 S. Ct. _____ (June 16, 1980) and Jenkins v. Anderson, _____ U.S. _____, 65 L.Ed. 2d 86, 100 S. Ct. _____ (June 10, 1980).

B. The Georgia Court of Appeals in deciding against Anderson relied on the Georgia Supreme Court's decision in Scott v. State, 243 Georgia 233 (1979), which decision decides an important question of Federal law in conflict with this Court's decision in Mincey v. Arizona, 437 U.S. 385, 98 S.C. 2408, 57 L.Ed. 2d 290 (1978), see concurring opinion in Scott v. State, 243 Georgia 233, at 235.

C. The Georgia Court of Appeals has decided a Federal question in a way in direct conflict with the decision of the Fifth

Circuit Court of Appeals in Breedlove v. Beto, 404 F. 2d 1019 (1968).

ARGUMENT

A. THE GEORGIA COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT IN LIGHT OF THIS COURT'S RECENT DECISION IN ANDERSON V. CHARLES, ____ U.S. _____, 65 L.Ed. 2d 222, 100 S. Ct. _____ (June 16, 1980) AND JENKINS V. ANDERSON, ____ U.S. ____, 65 L.Ed. 2d 86, 100 S. Ct. _____(June 10, 1980).

This Court has recently "straddled" Doyle v. Ohio, 426 U.S. 610 in the aforementioned cases.

In Jenkins, supra, the Court held that a prosecutor may impeach a testifying defendant with his pre-arrest silence.

In Anderson v. Charles, supra, this Court held that cross-examination of an accused at his murder trial in state court regarding inconsistencies between his direct testimony and the testimony of the police officer who arrested him did not violate due process. In Anderson, supra, the State presented its case in chief (see L.Ed. 2d at 224) via testimony by the arresting police officer that the defendant had been "interviewed shortly after his arrest".

The petitioner Anderson does not contest either Anderson v. Charles, supra, or Jenkins v. Anderson, supra.

Other than the State assuming a fact not in evidence, i.e. that Anderson had made a statement incident to his arrest, there was no showing or proffer that Anderson had made any statement whatsoever. Based on the silent record, this Court must indulge the presumption that Anderson did not waive his rights under Jackson v. Denno, 378 U.S. 368, or Miranda v. Arizona, 384 U.S. 436, or Doyle v. Ohio, 426 U.S. 610. In this regard, see Johnson v. Zerbst, 304 U.S. 458, Brookhart v. Janis, 384 U.S. 1, and Carnley v. Cochran 369 U.S. 506.

Therefore, we have here Anderson making no statement and the State "creating" an inconsistent impeaching statement via cross-examination.

When confronted with the improper question asked by the District Attorney, Anderson was left with the classical Hobson's choice.

He certainly should not have been compelled (whip-sawed) to deny that he denied the transactions in question, because such denial, per se, would accomplish what Anderson seeks to rectify, i.e. a focus upon his post-arrest silence.

The Georgia Court's decision imperils the right of each and every defendant to give exculpatory testimony when said defendant has exercised his rights to remain silent incident to his arrest.

For example, where a defendant has exercised his right to remain silent in a homicide prosecution and where the State introduces no evidence that the defendant gave any statement incident to his arrest and where the defendant testifies that he acted in self-defense, the State could, under this Georgia decision, cross-examine the defendant thusly: "But you denied shooting the victim when you were arrested, didn't you?".

It must be emphasized that such a question could be asked regardless of whether the denial was in fact made with "positive" con-

sequences to the probability of conviction. For if the defendant denies a denial, he focuses upon his silence, which constitutes a waiver of his rights under Doyle v. Ohio, supra. If the defendant does not deny the denial, he leaves the jury to infer that he did deny the transaction in question, thereby impeaching his trial testimony.

In this context, a fortiori, a "no statement" situation cannot stand on weaker constitutional ground than an "involuntary statement" situation. That is, if the State cannot introduce an involuntary statement for any purpose, Mincey v. Arizona, 437 U.S. 385, 397, does it not follow that the State ought not to be allowed to introduce a "statement" that wasn't made in fact (and must be presumed at law not to have been made) for impeachment purposes?

Thus, the Georgia decision under attack allows the State to do indirectly what it cannot do directly, i.e. cause the jury to draw impermissible inferences from the defen-

dant's silence, thereby, by circumvention, emasculating the vitality of Doyle v. Ohio, supra, and its progeny.

This Court has never dealt with a question of this nature. It ought to. The Georgia decision under attack, if allowed to stand, will permit Georgia prosecutors to "shotgun" their cross-examination, will chill every defendant's right to testify affirmatively in his defense when he has given no statement incident to his arrest, and will create substantial confusion of the meaning of this Court's decisions herein relied upon in the Georgia appellate system.

B. THE GEORGIA COURT OF APPEALS IN DECIDING AGAINST ANDERSON RELIED ON THE GEORGIA SUPREME COURT'S DECISION IN SCOTT V. STATE, 243 Georgia 233 (1979), WHICH DECISION DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW IN CONFLICT WITH THIS COURT'S DECISION IN MINCEY V. ARIZONA, 437 U.S. 385, 98 S.C. 2408, 57 L.Ed. 2d 290 (1978), SEE CONCURRING OPINION IN SCOTT V. STATE, 243 Georgia 233, at 235.

The Georgia Supreme Court decision in Scott v. State, 243 Ga. 233, as manifested clearly by Justice Hill's concurring opinion, interprets Jackson v. Denno, 378 U.S. 368 to mean that an involuntary confession may be used for purposes of impeachment. This, of course, is in direct conflict with this Court's decision in Mincey v. Arizona, 437 U.S. 385, 397 (1978). The Georgia Court of Appeals, in affirming the petitioner Anderson's conviction relied on Scott v. State and the above erroneous interpretation.

Both the six to one majority in Scott, supra, and the Georgia Court of Appeals in affirming Anderson's conviction (153 Ga. App. 841) misapplied and misconstrued Harris v. New York, 401 U.S. 222.

It would seem clear that this Court ought to rectify the erroneous interpretations given this Court's decisions by the Georgia Supreme Court.

If the Georgia Supreme Court had correctly interpreted Mincey v. Arizona, 437 U.S. 385, they would not have held that "an involuntary confession may be used for purposes of impeachment" and the Georgia Court of Appeals would not have relied on such an erroneous principle in affirming the petitioner Anderson's conviction.

Thus, this Court should grant certiorari not only to avail Anderson of due process, but to correct serious misinterpretations of this Court's decisions which have been made by the highest Court of the State of Georgia.

C. THE GEORGIA COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN DIRECT CONFLICT WITH THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS IN BREEDLOVE V. BETO, 404 F. 2d 1019 (1968).

Breedlove v. Beto, 404 F.2d 1019 (5th Cir. 1968) is strikingly in point to the subject case. In Breedlove, as in the instant case, the District Attorney sought to impeach a testifying defendant, through cross-examination, with a statement allegedly made by the testifying defendant which was inconsistent with the self-defense testimony.

In Breedlove, the testifying defendant acknowledged the conduct in question, i.e. causing the death of another, but affirmatively testified to the defense of self-defense. The District Attorney, in Breedlove, in violation of Jackson v. Denno, absent any offering that any statement had been given, attempted, pursuant to cross-examination, to show that Breedlove had made a statement incident to his arrest which statement was inconsistent with the self-defense testimony.

The Breedlove court rejected the argu-

ments made by the State in that case, which arguments are virtually identical to those arguments made by the State in this case by both the District Attorney at the trial level (T. 262, 263) and the rationale upon which the Georgia Court of Appeals affirmed Anderson's conviction. See Anderson v. The State, 153 Ga. App. 841.

Breedlove, supra, survives Harris v. New York, 401 U.S. 222, which case was misapplied and misconstrued by both the District Attorney at the trial level (T. 262) and the Georgia Court of Appeals, see Anderson v. The State, 153 Ga. App. 841.

APPENDIX

IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

THE STATE OF GEORGIA	*	
	*	#59107
VS.	*	
	*	153 GA. APP. 841
ANDERSON, WILLIAM	*	

BANKE, Judge.

The appellant, a former sheriff of Richmond County, appeals his convictions on two counts of selling marijuana. In the face of the overwhelming evidence introduced against him at trial, including tape recordings of his conversations with government informants, he admitted that he had arranged the sales and pled entrapment. On cross examination, the state attempted to impeach him in the following manner: "Let me ask you this, you denied these transactions when Lt. Sanders arrested you there in Forrest Squires' apartment, didn't you?" Defense counsel immediately objected and moved for a mistrial on the ground that the state had not previously sought to introduce evidence that the appellant made such a denial and thus had not given him an opportunity to seek a Jackson v. Denno

hearing to contest the voluntariness of the statement. The trial court denied the motion but instructed the state not to pursue the question and told the jury to disregard it. The state made no subsequent attempt to introduce evidence to substantiate its position that the defendant had denied guilt when arrested. The overruling of the motion for mistrial is the sole enumeration of error on appeal. Held:

Since the state asked the question for the purpose of impeaching the appellant's exculpatory entrapment testimony, no Jackson v. Denno hearing was required. See Scott v. State, 243 Ga. 233 (1) (253 SE2d 698)(1979). See also Harris v. New York, 401 U.S. 222 (91 SC 643, 28 LE2d 1)(1971). Cf. Perkins v. State, 152 Ga. App. 101, 103 (262 SE2d 158) (1979). The appellant further contends, however, that if he had been forced to answer the question, his response might have been that he had in fact remained silent upon his arrest and that the question therefore amounted to an impermissible comment on his

right to remain silent. See Doyle v. Ohio, 426 U.S. 610 (96 SC 2240, 49 LE2d 91)(1976). While it is fascinating to speculate on what the appellant's response might have been, the fact remains that he made no response. As indicated previously, his objection was sustained, and the jury was instructed to disregard the question. Accordingly, we do not find, in the face of the compelling body of evidence introduced against the appellant, that the trial court abused its discretion in denying his motion for mistrial.

Judgment affirmed. McMurray, P. J., concurs. Smith, J., concurs in the judgment only.

Argued January 15, 1980 - Decided February 15, 1980 - Rehearing denied March 12, 1980 - Cert. applied for.

Drug violation. Richmond Superior Court. Before Judge Fulcher.

Theodore S. Worozbyt, for appellant.

Richard E. Allen, District Attorney, James W. Purcell, Assistant District Attorney, for appellee.

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA JUNE 19, 1980

Dear Sir:

Case No. 36230, Anderson v. The State

The Supreme Court today denied the writ of certiorari in this case.

Very truly yours,

MRS. JOLINE B. WILLIAMS,
Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

ATLANTA 7/15/80

DEAR SIR:

The motion for a reconsideration was denied today:

Case No. 36230, Anderson v. The State

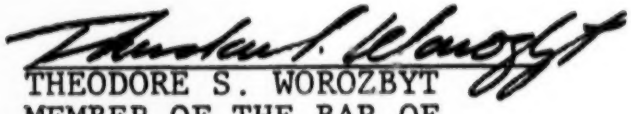
Yours very truly,

MRS. JOLINE B. WILLIAMS,
Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of the foregoing Petition for the Writ of Certiorari on Mr. Richard E. Allen, District Attorney, Augusta Judicial Circuit, Suite 500, 500 Building, Augusta, Georgia, 30902, by depositing said three (3) copies in a United States Post Office, with first-class postage prepaid, addressed to him at the above address.

This 11th day of September, 1980.



THEODORE S. WOROZBYT
MEMBER OF THE BAR OF
THIS COURT
ATTORNEY FOR PETITIONER
WILLIAM A. ANDERSON

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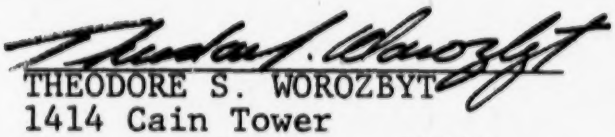
NOTICE OF ENTRY OF APPEARANCE

COMES NOW THEODORE S. WOROZBYT, a member of the Bar of this Court, and enters his appearance as counsel for the Petitioner William A. Anderson.



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September 11, 1980